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IN THE SUPREME COURT OF CANADA
(On Appeal from the Federal Court of Appeal)

MAVIS BAKER

Appellant

-and-

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

-and-

THE CANADIAN COUNCIL OF CHURCHES
CHARTER COMMITTEE ON POVERTY ISSUES
CANADIAN FOUNDATION FOR CHILDREN, YOUTH AND THE LAW

Intervenors

FACTUM OF THE INTERVENOR CANADIAN COUNCIL OF CHURCHES

Jackman & Associates
Barristers & Solicitors
281 Eglinton Ave.E.
Toronto, Ontario
M4P 1L3
Tel: (416) 482-6501
Fax: (416) 482-9834

Counsel for the Intervenor,
Canadian Council of Churches
Barbara Jackman

Lang Michener
Barristers & Solicitors
Suite 300, 50 O'Connor St.
Ottawa, Ontario
K1P 6L2
Tel.: (613) 232-7171
Fax: (613) 231-3191

Agent for Counsel for the
Intervenor, Canadian Council
of Churches
David M. Attwater

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Jackman & Associates
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281 Eglinton Ave.E.
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Tel: (416) 482-6501
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Counsel for the Intervenor,
Canadian Council of Churches
Barbara Jackman

Lang Michener
Barristers & Solicitors
Suite 300, 50 O'Connor St.
Ottawa, Ontario
K1P 6L2
Tel: (613) 232-7171
Fax: (613) 231-3191

Agent for Counsel for the
Intervenor, Canadian Council
of Churches
David M. Attwater

Roger Rowe and Rocco Galati
Barristers & Solicitors
1183 Finch Avenue West
Suite 405
North York, Ontario
M3J 2G2
Tel: (416) 739-0271
Fax: (416) 739-0445
Roger Rowe
Counsel For the Appellant

Lang Michener
Barristers & Solicitors
Suite 300, 50 O'Connor St.
Ottawa, Ontario
K1P 6L2
Tel: (613) 232-7171
Fax: (613) 231-3191
David M. Attwater
Ottawa Agent for Counsel
for the Appellant

Deputy Attorney General for Canada
Department of Justice
Exchange Tower
2 First Canadian Place
Box 36, Suite 3400
Toronto, Ontario
M5X 1K6
Tel: (416) 973-3469
Fax: (416) 954-8982
Urszula Kaczmarczyk
Cheryl D. Mitchell
Counsel for The Respondent

Tory Tory DesLauriers Binnington
Barristers & Solicitors
Suite 3000, Aetna Tower
P.O. Box 270 Toronto-Dominion
Centre
Toronto, Ontario
M5K 1N2
Tel: (416) 865-8245
Fax: (416) 865-7380
Counsel for the Intervenor,
Charter Committee on Poverty
Issues
John Terry
Craig Scott

Lang Michener
Barristers & Solicitors
Suite 300, 50 O'Connor St.
Ottawa, Ontario
K1P 6L2
Tel: (613) 232-7171
Fax: (613) 231-3191
Agent for Counsel for the
Intervenor, Charter Committee
on Poverty Issues
Kenneth S. Purchase

Canadian Foundation for Children,
Youth and the Law, et al.
405 - 720 Spadina Avenue
Toronto, Ontario
M5S 2T9
Tel: (416) 920-1633
Fax: (416) 920-5855
Counsel for the Intervenor,
Canadian Foundation for Children,
Youth and the Law, et al.
Sheena Scott

South Ottawa Community Legal
Services
406 - 1355 Bank Street
Ottawa, Ontario
K1H 8K7
Tel: (613) 733-0140
Fax: (613) 733-0401
Agent for Counsel for the
Intervenor, Canadian Foundation
for Children, Youth and the Law,
et al.
Chantal Tie

Court File No. 25823

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(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

B E T W E E N :

MAVIS BAKER

Appellant

and

THE MINISTER OF CITIZENSHIP & IMMIGRATION

Respondent

and

THE CANADIAN COUNCIL OF CHURCHES
CHARTER COMMITTEE ON POVERTY ISSUES
CANADIAN FOUNDATION FOR CHILDREN, YOUTH AND THE LAW

Intervenors

FACTUM OF THE INTERVENOR CANADIAN COUNCIL OF CHURCHES

PART ONE - THE FACTS

1. The Intervenor, Canadian Council of Churches (hereinafter referred to as the Council), relies on the facts set out by the Appellant in her Factum.

PART TWO - ISSUES

2. The Council intervenes in respect of the first and the third issues raised by the Appellant relating to the fairness of the process and effect of a treaty obligation on the exercise of a statutory power of discretion.

3. In relation to both issues the Council addresses:

a. the nature of Canada's obligation through its domestic laws, practices and procedures to ensure that there are domestic remedies, which are meaningful, effective, and fair, available to persons claiming a human rights breach.

b. the scope of human rights protections to be afforded to persons who are not citizens of Canada.

4. The Council does not directly address the issue of whether human rights are engaged. This is addressed by the Appellant and other Intervenors. For the purposes of the Council's submissions it relies on the arguments put forward by the Appellant and the other Intervenors, and assumes the engagement of the human right.

PART THREE - LAW AND ARGUMENT

5. The Council's submissions below are developed in large part by reference to Canada's international human rights obligations and to its domestic obligations in this respect as applied directly by the Court and mandated by the *Charter of Rights and Freedoms*. The Council is aware that this appeal is not a constitutional challenge to any provision of the *Immigration Act*. However, if it is accepted by this Court that there would be an infringement of a human right with the removal of the Appellant, then the Council believes that this must inform an analysis of the process which the Appellant accessed and the standards to apply.

Slaight Communications Inc. v Davidson, [1989] 1 S.C.R. 1038
Cloutier v Langlois, [1990] 1 S.C.R. 158

A. EFFECTIVE REMEDY:

6. The position taken by the Appellant and the intervenors is that removal of the Appellant disentitles her and her children to the human rights protection which the Appellant claims on her own and her children's behalf. This gives rise to a consideration of the process under which the Appellant is being required to leave Canada and the standards which do apply or should apply to that process. The Council develops two basic arguments in this part of its submissions: (i) the importance of the right to an effective remedy in the domestic and international law context, and (ii) the substantive and procedural safeguards required for compliance with the principles of fundamental justice, taking into account that the right to an effective remedy is incorporated in such principles.

7. The Council submits that the present legislative and administrative structure in respect of removal of a non-citizen does not provide an effective procedure to determine whether to give effect to human rights entitlement of a non-citizen parent and her Canadian children. There being no effective procedure for a principled determination of whether to respect human rights entitlement above state interests, there is not and there cannot be an effective remedy.

A.1. Right to Remedy as an Independent Right:

8. The Council submits that the right to an effective remedy is an independent and separate right fundamental to the protection of other human rights.

9. In the international human rights context, the availability of an effective remedy is considered an inalienable or non-derogable right. Article 10 of the *Universal Declaration of Human Rights (UDHR)* recognizes the right to a fair and public hearing in the determination of rights and obligations. Article 8 recognizes the right to an effective remedy by competent tribunals for acts violating the fundamental rights granted by constitution or by law. Where a state does not provide an effective remedy under domestic law, this is considered to itself be an independent breach under the *International Covenant on Civil and Political Rights (ICCPR)* and the *Inter-American Declaration on the Rights and Duties of Man (IAD)* by both the UNHRC and the IACHR respectively.

Universal Declaration of Human Rights, UN Res. 217 A (III), Art. 10
International Covenant on Civil and Political Rights, CTS 1976/47, Art. 9(4)
Charter of the Organization of American States, CTS 1990/23; Inter-American Declaration on the Rights and Duties of Man, Art. XVIII, XXV

10. The right to an effective remedy is articulated in the specific convention, the CRC, which addresses the human rights of children, reinforcing the importance of the right by requiring that there be a judicial remedy, under Article 9, and by its incorporation into Article 10.

Convention on the Rights of the Child, CTS 1992/3, Art. 9, 10

11. The UNHRC has recognized a general right to a remedy from a breach of the ICCPR under

Article 2(3)(a) of the ICCPR. The absence of an effective domestic remedy relieves a complainant from the obligation to exhaust domestic remedies before bringing a complaint to the UNHRC under the ICCPR. The United Nations Subcommission on Prevention of Discrimination and Protection of Minorities recognizes the right to claim effective remedies against a breach of the ICCPR as "inherent in the Covenant as a whole and should accordingly be considered non-derogable, particularly because they are necessary to protect other non-derogable rights".

Hammel v Madagascar, Comm. No. 155/1983, April 3, 1987 (UNHRC)
A v Australia, Comm.No. 560/1993. CCPR/C/59/D/560/1993, April 30, 1997
Richards v Jamaica, Comm. No. 535/1993. CCPR/C/59/D/535/1993, March 31, 1997
Williams v Jamaica, Comm. No. 561/1993, CCPR/C/59/D/561/1993, April 8, 1993
Chernichenko and Treat, supra., E/CN.4/Sub.2/1991/29, July 5, 1991, at p. 21, para. 100;
E/CN.4/Sub.2/1992/24/Add.3, April 29, 1992, at p. 11, para. 54
Despouy, Leandro, Special Rapporteur, The Administration of Justice and the Human Rights of Detainees; Question of Human Rights and States of Emergency, United Nations Commission on Human Rights, E/CN.4/Sub.2/1994/23, June 3, 1994, at p. 5, para. 20-23
Report of the SubCommission on Prevention of Discrimination and Protection of Minorities, E/CN.4/1995/2; Sub.2/1994/56, Oct. 28, 1994, Res. 1994/35 'Right to a Fair Trial', at p. 84

12. The Inter-American Court has similarly recognized that the failure to provide for a remedy is a separate violation of the IAD. In *Velasquez Rodriguez v Honduras*, a decision which focused on admissibility of the petition, the Court concluded:

> Thus, where certain exceptions to the rule of non-exhaustion of domestic remedies are invoked, such as the ineffectiveness of such remedies ***or the lack of due process of law***, not only is it contended that the victim is under no obligation to pursue such remedies, but indirectly, the state in question is also charged with a new violation of the obligations assumed under the Convention.

Velasquez Rodriguez v Honduras, Judgement on Preliminary Objections, June 27, 1987 (IACHR)
Advisory Opinion, OC-11/90, August 10, 1990 (IACHR)

13. Like the UNHRC, the Inter-American Court and Commission have concluded that 'essential ***judicial*** guarantees' which are not subject to derogation include *habeas corpus* and any other effective remedy before judges or competent tribunals, which is designed to guarantee the respect of the rights and freedoms whose suspension [i.e. in states of emergency] is not authorized by the Convention.

Advisory Opinion OC-9/87, Judicial Guarantees in States of Emergency, October 6, 1987 (IACtHR)
Chernichenko and Treat, supra., E/CN.4/Sub.2/1992/24/Add.2, May 27, 1992, at p. 6, para. 35

14. Section 24(1) of the *Charter of Rights and Freedoms* provides that anyone whose rights or freedoms guaranteed by the *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the Court considers appropriate or just in the circumstances. Section 52(1) of the *Constitution Act, 1982* provides that any law inconsistent with the *Charter* is of no force and effect to the extent of such inconsistency. Section 7 of the *Charter* guarantees that life, liberty and the security of the person interests cannot be infringed without compliance with the principles of fundamental justice. These provisions effect domestic compliance with Canada's international human rights obligation to provide for an effective domestic remedy from a human rights infringement. It is primarily the requirement for compliance with the principles of fundamental justice which founds the Council's submissions as to the nature of an effective remedy in the appeal at bar.

Mills v The Queen, [1986] 1 S.C.R. 863, at p. 881
R v Gamble, [1988] 2 S.C.R. 595 at p. 633-634

A.2. Present Domestic Structure:

15. The procedures applied to the Appellant included:

a. An oral removal hearing before an immigration adjudicator (which now may be held before a senior immigration officer without an oral hearing and without right to counsel) to determine whether the Appellant was in compliance with *Immigration Act* requirements concerning temporary or permanent status.

b. A consideration of a request for relief under section 114(2) of the *Immigration Act* that there exist humanitarian and compassionate grounds which warrant the exercise of discretion to exempt a person from the requirements of both applying for an immigrant visa from outside Canada under section 9 of the *Immigration Act* and from regulatory selection criteria normally required to qualify for admission. This process is by way of written application and may or may not

include an oral interview before an immigration officer - either an inland officer charged with processing such requests or an enforcement officer charged with removal responsibilities, such as in the case at bar.

c. Judicial review with leave is available in the Federal Court Trial Division from a decision to issue a removal order and from a decision to refuse a request for an exemption from statutory and regulatory requirements under s. 114(2) of the *Immigration Act*.

16. Human rights entitlement is not at issue in the removal hearing. While the adjudication process may comply with the principles of fundamental justice, the scope of the determination to be made is limited to a determination of person's actual status at the time of the hearing. The adjudicator is limited by the terms of her statutory grant of jurisdiction and so cannot consider nor decide to grant status based on an assertion of human rights entitlement. Judicial review in the Federal Court from the decision of an adjudicator to issue a removal order is similarly limited by the scope of the adjudicator's statutory authority.

17. The humanitarian process is sufficiently broad to include the determination of human rights entitlement and to incorporate an assessment of an individual's human right against state interests where entitlement is recognized. This, for example, has been recognized by the Federal Court where a person asserts a risk of torture and other forms of cruel, inhuman or degrading treatment if removed to a particular country. It was recognized as well at common law as a qualifier on the ability of Canada to effect removal. These are the most serious violations, but there is no conceptual reason to avoid the same result with respect to other human rights.

Farhadi v M.C.I., unreported, F.C.T.D. IMM-3846-96/IMM566-97, March 20, 1998
Re Hanna (1957) 8 D.L.R. (2d) 566 (B.C.S.C.)
Pushpanathan v M.C.I., [1998] S.C.J. No. 46, per Cory, J. para. 157
Arduengo v M.C.I., [1997] 3 F.C. 468 (T.D.)
Ngyuen v M.E.I., [1993] 1 F.C. 696 (C.A.)
Orelien v M.E.I., [1992] 1 F.C. 592 (C.A.)
Barrerra v M.E.I., [1993] 2 F.C. 3 (C.A.)

18. The problem with the current humanitarian consideration practices, in the context of the

issues arising in this appeal, is two fold:

a. There is no recognition of human rights engagement, much less entitlement, either under the *Charter* or otherwise under international law. Thus there can be no assessment of human rights entitlement against state interests, necessary for substantive compliance with the principles of fundamental justice.

b. The procedures which may purport to effect compliance with the principles of fundamental justice do not meet due process standards.

19. Judicial review from a decision to refuse to exercise a statutory power of discretion to permit landing from within Canada is potentially capable of being an effective remedy, aside from the adequacy of the leave process which has not been put at issue here. However a barrier to actual effectiveness of the remedy is the jurisprudence of the Federal Court itself which applies a reasonableness standard to review of decision making, denies the engagement of a human right in cases such as the one at bar, and applies a minimalist fairness standard to the humanitarian consideration process.

Baker v M.C.I., [1997] 2 F.C. 127 (C.A.)
Langner v M.E.I. (1995), 184 N.R. 230 (F.C.A.)
Kretowicz v M.E.I. (1987), 77 N.R. 38 (F.C.A.)

A.3. Compliance with Effective Remedy Obligation:

20. As stated at the outset, the Council relies on the submissions of the Appellant and the other Intervenors, that both the Appellant mother and her Canadian children have human rights engaged by the removal process. As such the Council does not address the jurisprudence of the Federal Court which denies the engagement of such rights, but rather addresses the two remaining issues - the adequacy of the determination process and the standard of review of the decision made.

21. The fundamental principle informing considerations of process is the concept of fairness. Integral to this is a consideration of the consequences of a decision on the individuals involved. This Court has recognized that a determination of the norms of procedural fairness is dependent on the

interests at stake, both in the sense of natural justice safeguards and the standard to be applied to a consideration of the evidence. Further, this Court has shown some degree of deference to Parliamentary choice in respect of the administrative structure adopted.

Nicholson v Haldimand-Norfolk (Regional) Police Commissioners, [1979] 1 S.C.R. 311
Knight v Indian Head School Division (No.19), [1990] 1 S.C.R. 653
Martineau v Matsqui Institution, [1978] 1 S.C.R. 118

22. The Respondent has argued that Parliament has provided a discretionary process, with minimal safeguards at best, to consider the grant of a benefit or privilege to an non-citizen with no consequent right on the part of the person concerned to any particular outcome. There is no doubt within the context of the *Immigration Act* that the grant of permission to remain in Canada is a statutory benefit in the circumstances of the case at bar, because landing rights accorded by statute are not ones which can be claimed by this Appellant.

23. However, while recognizing the above, the Council submits that this mischaracterizes the nature of the issue in this appeal. It is clear that international and domestic law do not recognize the right of a person to choose a country of residence, unless it is that person's country of nationality, nor the right of a family with more than one nationality among them to choose its country of residence. International law - conventional and customary - does recognize an obligation on the part of a state to both recognize the engagement of human rights and to factor into decision making a consideration of such rights through a fair process. Further international law recognizes the relationship between parent and child as a human right of both deserving of protection, which may carry with it a consequent right of either a parent or child to remain in a country which is not her country of nationality. The issue in this appeal as the Council characterizes it, is whether Canada is obliged to consider the liberty interests of a non-resident parent and Canadian children, and in context of this consideration, the best interests of the child and, if so obliged, whether the consequences caused by the Appellant's removal warrant a stricter procedural safeguards.

Slaight Communications Inc. v Davidson, supra.

24. The present *Immigration Act* recognizes no engagement of rights in and establishes no procedure for the exercise of humanitarian and compassionate discretion in relation to admission of non-citizens. The process is administratively structured and the discretion is unfettered. Fashioning a fair process capable of providing an effective remedy can be accomplished administratively within the present structure of the Act.

25. It is the Council's submission that the necessary attributes to fair process include:

a. Recognition that the liberty and/or the security of person interests of the Appellant and her children are engaged by the consideration. The principles of fundamental justice include a substantive component under section 7 of the *Charter*, which at a minimum must include recognition that a human right is engaged. Further, section 2(e) of the *Bill of Rights* provides for a right to a fair hearing in accordance with the principles of fundamental justice in the determination of a person's rights and obligations. The obligation to provide a fair hearing is itself dependent on a recognition of the existence of a right, although such rights may be broader than human rights.

Singh v M.E.I., [1985] 1 S.C.R. 177
Bill of Rights, s. 2(e)

b. A duty on the part of immigration officials not only to give notice to children who will be affected by the refusal to exercise humanitarian discretion, but to ensure that minor children are represented by a guardian to represent their interests. In practical terms, minor children are not in a position to defend their interests, which is why the CRC imposes on state parties the positive obligation to ensure consideration of the best interests of a child in all decisions affecting them.

c. A duty on the part of the Respondent to ensure that there is a decision maker who is independent and impartial. While the jurisprudence to date does not recognize this as an aspect of a proper humanitarian consideration process, fairness dictates that there must be some degree of distance between the decision maker and the executive in a consideration of human rights disentitlement.

d. A duty on the part of the decision maker to hear the child and her parent(s), including by way of an oral hearing where credibility is at issue, in accordance with Art. 12 of the CRC.

e. A duty on the part of the decision maker to give reasons for the decision made.

Reasons are an essential aspect of an effective remedy, because the absence of reasons leaves a reviewing court or body with no ability to assure itself that proper principles have been applied to human rights entitlement considerations.

26. A consequent element of an effective remedy is the role of the courts in ensuring respect by state actors for the human rights of the individuals who come before them. In this sense, as recognized by this Court in *Pushpanathan v M.C.I.*, human rights entitlement (or disentitlement) is an indicator of the degree of scrutiny which a court must apply on review of a decision which has a disentitlement effect. The Council submits that human rights disentitlement mandates the highest degree of scrutiny, both with respect to recognition of the existence of the human right - a question of law - and with the assessment of the facts leading to disentitlement, which may include both an analysis of law and fact. Other factors such as the presence of a privative clause or a special expertise could reduce the standard accordingly but no such factors apply in this case.

Pushpanathan v M.C.I., [1988] S.C.J. No. 46, per Bastarache, J. para. 36, 45-50

B. NON-DISCRIMINATION IN RIGHTS AND REMEDIES FOR NON-CITIZENS:

27. In *Chiarelli v Canada* this Court reaffirmed that the *Charter* is to be interpreted in light of the context in which it arises. This Court indicated that the context for a non-citizen requires looking to the principles and policies underlying immigration law, the most fundamental being that "non citizens do not have an ***unqualified*** right to enter or remain in the country. At common law an alien has no right to enter or remain in the country".

Chiarelli v Canada, [1992] 1 S.C.R. 711, at p. 732-733

28. The Council submits that the reasoning in *Chiarelli* is capable of being misread to lead to unwarranted restrictions on human rights protections of non-citizens in Canada, solely by virtue of their lack of Canadian citizenship. There are two issues arising from the reasoning in *Chiarelli v Canada*, which are of import to the case at bar, and which the Council submits are in need of further clarification by this Court. The first is whether the rights and freedoms entrenched in the *Charter*, save for those specifically applying only to citizens and permanent residents, can be claimed by non-

citizens. The second issue is how the status of the individual in Canada is to factored into *Charter* analysis. The Council's view is that where non-citizens assert rights this is always an international concern, because of the legal interest of at least two states and therefore the relevant context, where a human right of a non-citizen is engaged, is international.

B.1. Entitlement:

29. The Council wishes to reaffirm the position which it took before this Court in *Singh v M.E.I.* - that the rights and freedoms guaranteed by the *Charter* apply to every person subject to Canada's jurisdiction, unless specifically reserved for Canadians and/or permanent residents, as with sections 3 and 6 of the *Charter*.

Singh v M.E.I., *supra*.

30. The Council's view was recognized by this Court in *Singh v M.E.I.* in the context of determining both the engagement of section 7 interests and the application of section 2(e) of the *Bill of Rights*. It is implicitly recognized in the section 27 of the *Charter* which requires that the *Charter* be interpreted in a manner consistent with the preservation and enhancement of the multi-cultural heritage of Canada. Along with its aboriginal foundations, Canada's heritage is an immigrant one. Canada is a country built in partnership between its original habitants and successive waves of non-citizens who sought to settle here and still seek to do so for many reasons - the promise of a better future, reunification with close family members who came before, or escape from intolerable living conditions.

31. Further, the Council's view is consistent with Canada's international obligations. Over the past several decades international human rights law has been evolving significantly, so that it is today clear that Canada is obligated to the international community of states to respect the human rights of non-citizens subject to its jurisdiction. This includes significant rights which extend to the regulation of aspects of cross border movement of persons, primarily family members and persons whose physical security is at stake.

32. Canada has ratified the *International Covenant on Civil and Political Rights* (ICCPR), including the *Optional Protocol* thereby permitting individuals in Canada to make complaints to the United Nations Human Rights Committee (UNHRC) of breaches of the ICCPR. Through its ratification of the *Charter of the Organization of American States*, Canada is also bound to comply with the *Inter-American Declaration on the Rights and Duties of Man* (IAD) and is answerable to individual complaints of breaches of the Declaration to the Inter-American Commission of Human Rights (IACHR). Although not subject to the jurisdiction of the Inter-American Court, that Court's jurisprudence is applicable to the Commission.

International Covenant on Civil and Political Rights, CTS 1976/47
Charter of the Organization of American States, CTS 1990/23

33. Art. 2(1) of the ICCPR obligates each state party:

> to respect and ensure ***all individuals within its territory and subject to its jurisdiction*** the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property birth or other status.

This duty to respect and ensure human rights protection is reiterated in Article 2(1) of the *Convention on the Rights of the Child* (CRC).

ICCPR, supra., Art. 2(1)
Convention on the Rights of the Child, CTS 1992/3, Art. 2(1)

34. The UNHRC has emphasized the application of the ICCPR to ***all*** persons within the jurisdiction of a state party. The UNHCR notes in General Comment 15 on the position of aliens:

> Reports from States parties have often failed to take into account that each state party must ensure the rights in the Covenant to "all individuals within its territory and subject to its jurisdiction" (Article 2, para. 1). In general the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness.

UNHRC, General Comments Adopted Under Article 40(4) of the ICCPR, GC No. 15, CCPR/C/21/Rev.1, May 19, 1989, at p. 17, para. 1; GC No. 24, CCPR/C/21/Rev.1/Add.6, Nov. 11, 1994, at p. 4, para. 12
ICCPR, supra., Art. 2(1)

35. While the UNHRC recognizes distinctions between non-citizens and citizens, as for example, in relation to the right to enter and remain in a country, it has indicated in matters of immigration, that the protection of the Covenant applies, in particular with respect to non-discrimination, prohibition of inhuman treatment and respect for family life. Once a non-citizen comes within a state's jurisdiction, the provisions of the Covenant apply. Fair trial norms under Article 13 in respect of non-citizens apply where the legality of a non-citizen's entry or stay is in dispute.

UNHRC, General Comments, GC No. 15, supra., at p. 17, para. 1, 7, 9

36. The Inter-American Court and Commission similarly recognize that the basic human rights set out in the IAD apply to citizens and non citizens. In *Velasquez Rodriguez* the Court stated:

> The second obligation of States Parties is to 'ensure' the free and full exercise of the rights recognized by the Convention to every person subject to its jurisdiction.

Velasquez Rodriguez v Honduras, July 29, 1988 (IACtHR)

37. In the *Haitian Interdiction Case*, the petitioners claimed violations of the IAD in respect of Haitians attempting to seek asylum in the United States, interdicted by US authorities on the high seas. Included were alleged violations of the right to petition for asylum and the right of petition to a court to determine rights. The IACHR upheld the claims in a recent opinion. Further in the *Garbi and Corrales Case* against the Government of Honduras, the victims were Costa Rican and while the claim failed for lack of proof that they had remained in Honduras and had disappeared there, the Inter-American Court proceeded on the basis that the breaches of the Covenant, including arbitrary detention, could be claimed on their behalf without making any distinction on the basis of citizenship.

Fairen Garbi and Solis Corrales v Honduras, March 15, 1989 (IACtHR)
Haitian Centre for Human Rights, et al. v United States, Case File 10.675, Report No. 51/96, OEA/Ser.L/V/II.95 rev. at 550, March 13, 1997 (IAComHR)

38. Although not determinative as an interpretive guide to the content of human rights under the *Charter*, the European Court has similarly recognized the claims by non-citizens to human rights

protection under the *European Convention on Human Rights*.

Chahal v the United Kingdom, E.Ct.H.R., File: 70/1995/576/662, November 15, 1996
Berrehab v Netherlands, E.Ct.H.R., File: 3/1987/126/177, June 21, 1988
Beljoudi v France, E.Ct.H.R. Series A. No. 246, 26 March, 1992
Soering v the United Kingdom, E.Ct.H.R. Series A. No. 161, July 7, 1989

B.2. Status as a Factor in Charter Analysis:

39. The second issue which arises from the reasoning of this Court in *Chiarelli v M.E.I.* is the extent to which lack of citizenship status informs *Charter* analysis. The Council accepts that the status of an individual may be considered in determining the scope of a right, where the particular right is susceptible to contextual delineation, the principles of fundamental justice, and as an indicator of informing an assessment of competing values in a section 1 analysis. It cannot be an indicator for determining the ***existence*** of the right itself.

40. The rights and freedoms guaranteed by the *Charter* are human rights, meant to promote inherent respect and dignity for each individual. If the existence of the right is determined in part by the status of the individual, then a Court implicitly sanctions discriminatory standards of protection as part of the *Charter* analysis itself, creating, as the Council has popularly characterized it, a 'legal apartheid' whereby Canada's human rights protections are applied in such a manner as to confine non-citizens to a legal space inferior to that enjoyed by citizens.

41. Such an approach of systematically building discrimination into rights would be completely inconsistent with the duty under international human rights law to apply the norm of non-discrimination to every other human right. It is particularly instructive that Article 2(3) of the *International Covenant on Social and Economic Rights* specifically reinforces that Article 2(2) of the Covenant prohibits discrimination against non-nationals in the enjoyment of various Covenant rights. The most directly relevant rights in that Covenant are Article 10(1) and (3), which require the widest possible protections for families, and the adoption of special measures of protection and assistance for children without discrimination for reasons of parentage.

International Covenant on Social and Economic Rights, CTS 1976/46, Art. 2(2), 2(3), 10

ICCPR, supra., Art. 2(1)
CRC, Art. 2(1)

42. It is important in approaching this issue to recall this Court's reasoning in adopting the contextual approach to section 1 *Charter* analysis. In *Edmonton Journal*, Madame Justice Wilson indicated:

> ... a particular right or freedom may have a different value depending on the context. It may be, for example, that freedom of expression has greater value in a political context than it does in the context of disclosure of the details of a matrimonial dispute. The contextual approach attempts to bring into sharp relief the ***aspect*** of the right or freedom which is truly at stake in the case as well as the relevant aspects of any values in competition with it. It seems to be more sensitive to the reality of the dilemma posed by the particular facts and therefore more conducive to finding a fair and just compromise between the two competing values under section 1.
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> *Edmonton Journal v Alberta (A.G.), [1989] 2 S.C.R. 1326, at p. 1355-1356, per Wilson, J.*

43. The Chief Justice, Mr. Justice Dickson, in adopting the reasoning of Madame Justice Wilson in *R. v Keegstra*, followed from there to indicate:

> Though Wilson J. was speaking with reference to the task of balancing enumerated rights and freedoms, I see no reason why her view should not apply to all values associated with a free and democratic society. Clearly, the proper judicial perspective under s. 1 must be derived from an awareness of the synergetic relation between two elements: the values underlying the *Charter* and the circumstances of the particular case.
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> *R. v Keegstra, [1991] 2 W.W.R. (S.C.C.), at p. 35, per Dickson, C.J.C.*

44. A development of concern to the Council is the extension of the 'contextual' approach used in the section 1 *Charter* analysis, to an analysis of the scope and content of the rights themselves. In *R. v Wholesale Travel Group Inc.*. Mr. Justice Cory stated:

> It is now clear that the *Charter* is to be interpreted in light of the context in which the claim arises. Context is relevant both with respect to the delineation of the meaning and scope of *Charter* rights, as well as to the determination of the balance to be struck between individual rights and the interests of society.
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> *R. v Wholesale Travel Group Inc., [1991] 3 S.C.R. 154, at p. 226, per Cory, J.*

45. In *Chiarelli v M.E.I.*, as noted above, this Court applied the contextual approach in the immigration context, concluding that the content of the principles of fundamental justice under section 7 of the *Charter* had to be assessed in light of the principles and policies underlying immigration law.

Chiarelli v M.E.I., supra., at p. 733, per Sopinka, J.

46. The contextual approach to *Charter* analysis was developed first as a means of evaluating competing legitimate interests engaged by the particular facts of a case in a section 1 analysis. It has been expanded by this Court to assist in delineating the meaning and scope of the content of a *Charter* right or freedom. A concern with this expansion is that it may lead to a compartmentalizing of rights within legal fields, the effect of which minimizes the rights themselves and shields them from the broader legal order.

47. This broadened approach to the use of context as a means of determining the ***content*** of rights and freedoms has the potential to negate *Charter* protection unless its application is carefully delineated and structured. It is the Council's submission, which it believes is consistent with the actual application of the contextual approach by this Court, that:

a. The contextual approach cannot be used to determine the existence of a right or freedom or its engagement.

b. Where the right itself has a contextual component, such as with the right to fair trial, then the contextual approach may be used to delineate the scope or the parameters of the right, provided that the purpose of the right itself is not lost in the context. The existence/scope distinction is however fragile and difficult to delineate. Some rights and freedoms do not have a contextual component, for example the freedom of religion or expression, such that the value to be given to the right or freedom must be assessed in the context of the circumstances by which it is engaged in a section 1 analysis. Other rights may be more open to a contextual analysis in respect of their scope, but there is a need for safeguards against a contextual reasoning on scope that amounts to the negation of rights on the basis of status. Without such safeguards, the contextual analysis could act against the requirement that section 15 *Charter* rights inform the scope of other rights under the

Charter.

R. v Genereux, [1992] 1 S.C.R. 259
Edmonton Journal v Alberta (A.G.), supra., at p. 1355-1356
Vriend v Alberta (1998), 156 D.L.R. (4th) 385 (S.C.C.)
Canadian Human Rights Commission v Taylor, [1990] 3 S.C.R. 892

c. The contextual approach, itself, must be contextualized in the broader analysis of the purposive approach. Recalling the reasoning of Lamer, J. in the *Motor Vehicle Reference* case, the rights entrenched in the *Charter* are not to be interpreted in a vacuum but rather are to be built from and upon our system of justice as it has developed over time, drawing upon essential sources from the common law, international human rights law and other sections of the *Charter*. The Council believes that the broader and dynamic human rights values being developed by the world community are an essential source for *Charter* analysis. While our present system of justice has developed from common law traditions, a contextual approach which is rooted primarily in the common law presents a danger of insulating rights in their common law history and its consequent limited internal logic.

Reference Re: s. 94(2) of the Motor Vehicle Act (B.C.), [1985] 2 S.C.R. 486 at p. 503, 512

d. Section 7 interests are not to be contextually determined. If a person has a life interest, no contextual analysis can or ought to negate the existence of this interest. It is the qualifier set out in section 7 which permits a contextual analysis because one must assess the importance and value of the right in the context in which it arises to delineate the scope of the principles of fundamental justice required for an infringement of the right. Sometimes this inquiry will be extremely strict depending on the nature of the right at stake and the degree of infringement. For example, the right to be free from torture is an absolute right.

R. v L. (D.O.), [1993] 4 S.C.R. 419
Kindler v Canada (Minister of Justice), [1991] 2 S.C.R. 779
Farhadi v M.C.I., unreported, F.C.T.D. IMM-3846-96/IMM-566-97, 20 March, 1998
Suresh v The Queen et al. (1998), 38 O.R. (3d) 267 (O.C.G.D.)

48. Status is not an appropriate factor to be given weight in a contextual analysis. This Court has recognized that at common law an alien had no unqualified right to enter or remain in the country. The Council does not take issue with this principle, provided that it is clearly recognized that the corollary to this is that there will be instances where the right to enter or remain can be asserted as

the result of other more general rights, such as the right to family reunification in Article 10(1) of the CRC and the right to be free from torture in Article 3 of the CAT.

49. There are clear instances where the lack of citizenship of an individual plays no role. For example, status would be irrelevant to a section 1 *Charter* assessment of competing values and interests in respect of the exercise of freedom of expression, as the exercise of this freedom is unrelated to status. It would be an unjust and discriminatory, if Canadians could speak freely, but a vulnerable class in society - immigrants or other non-citizens such as refugees - could not. This Court has avoided any such distinctions. As well, with fair trial for a criminal accused, this Court has not taken lack of citizenship as an indicator of the scope of fair trial norms. Citizens and non-citizens alike, accused of criminal offenses, are entitled to the same standards of protection in the criminal justice system.

Zundel v R, [1992] 2 S.C.R. 731
Swain v R, [1991] 1 S.C.R. 933

B.3. Application to the Facts:

50. It is apparent from the reasoning in *B.(R.) v Children's Aid Society of Metropolitan Toronto* that this Court has recognized that a parent has a liberty interest in relation to her child(ren) in the context of the integrity of the family. The Council submits that the lack of status of the Appellant before this Court in this appeal does not negate the existence of her liberty interest in respect of her children. Status cannot be the indicator for determining the existence of the right, otherwise the Courts would be introducing discrimination as the determinative standard of engagement: a Canadian mother has a liberty interest, but a non-Canadian mother does not.

B.(R.) v Children's Aid Society of Metropolitan Toronto, [1995] 1 S.C.R. 315

51. The corollary to the parent's liberty interest is that of the child, the more vulnerable person in the relationship and the one most in need of care and protection. The child's liberty and security of the person interest is broad in the sense that it includes the right of the child to have her parents and relevant others act in her best interest.

B.(R.) v Children's Aid Society, supra.
Gordon v Goertz, [1996] 2 S.C.R. 27

52. The Appellant and the other Intervenors have noted the importance of the individual's right to family integrity and the child's right to have her best interests taken into account as essential elements of a liberty interest and/or a security of the person interest. It is these interests which must inform the delineation of the principles of fundamental justice. To the extent that such interests are of paramount importance in both the domestic and international context, the principles to be applied in determining whether or not to infringe the interests must act as effective safeguards in ensuring a meaningful substantive based assessment of the circumstances.

Godbout v Longueuil, [1997] 3 S.C.R. 844, para. 58, 63-79

53. It is in this context, that the Council is of the view that the lack of citizenship status of the Appellant ought not to be determinative factor. Contextually, this is not the operative norm by which to determine the scope of the safeguards to be structured. Not only is the Appellant affected by the decision to remove her, her children are also affected, as is developed in the submissions presented by the Appellant and the other Intervenors. The children, as Canadians, have a right to remain in Canada. Although not themselves party to the proceedings, the effect of a decision on their interests must be taken into account in a contextual analysis. A contextual approach, permits no technical bifurcation of the Appellant's interests from that of her children, given the inter-connectedness of these interests.

54. The Council submits that a contextual analysis does not lend itself to a simple reduction of analysis to a single issue - at common law this Appellant would have no right to remain, therefore the principles of fundamental justice require minimal safeguards. Rather, the context is much more nuanced and complex given the Appellant's personal circumstances and the interlinking of interests between herself and her children.

55. The assertion by the Appellant of her children's rights is justified on two levels - (i) a truly

contextual analysis, sensitive to the realities of the situation, does not permit a court to ignore the children's interests, and (ii) the interlinking of interests for the purposes of determining a human rights violation has already been recognized by the Courts in immigration and in other contexts. It does not do credit to the Respondent, having sought successfully to exclude the Appellant's children from participation in this and the lower court proceedings, to argue that it is not open to the Appellant to plead as an aspect of her claim to human rights protection, the human rights protection of her children. In any case, the appropriate analogy is to *Big M Drug Mart*, which permits an actor to plead that a law is *ultra vires* as being violative of another person's rights. This appeal involves pleading the ultra vires status of an administrative decision. Particularly given the close connection between a mother and her child there should be no question of a similar right on the part of the Appellant to plead excess of jurisdiction for violation of the children's rights in this case.

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R v Big M Drug Mart Ltd., [1985] 1 S.C.R. 295
B.(R.) v Children's Aid Society, supra.
Re Singh et al, [1989] 1 F.C. 430 (C.A.)
Secretary of State v Meghani (1993) 21 C.H.R.R. D/427 (F.C.T.D.)

PART FOUR - ORDER SOUGHT

56. The Intervenor Council joins with the Appellant in requesting that this appeal be allowed.

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Barbara Jackman
Jackman, Waldman & Associates

Solicitor for the Intervenor
Canadian Council of Churches

PART FIVE - TABLE OF AUTHORITIES

INTERNATIONAL CASES